ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD	)	T03-0015
Petition for rulemaking to require safe walkways for railroad employees in the state	)	

MEMORANDUM IN SUPPORT OF THE JOINT MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., TO STRIKE STAFF "BRIEF ON EXCEPTIONS" AND, IN THE ALTERNATIVE, BRIEF IN REPLY

The Staff of the Illinois Commerce Commission ("Staff") purported to file a "Brief on Exceptions" in this proceeding on January 16, 2004, objecting to Administrative Judge June B. Tate's Proposed Order of January 7, 2004. This proceeding was initiated on February 18, 2003, and the Staff's recent Brief is the first record attempt by the Staff to take a position on the pending petition in this matter. The Illinois Administrative Code prohibits the Staff's attempted filing and it should be stricken. Even if the Staff's Brief is allowed, the Brief's arguments are baseless and unsupported by the record, and the Proposed Order should be adopted as issued on January 7, 2004.

SUMMARY OF FACTUAL BACKGROUND

This proceeding was initiated by a petition for rulemaking filed by the United Transportation Union ("Petitioner"). The petition sought the adoption of a mandatory rule regulating walkways alongside railroad tracks and in railyards. Norfolk Southern

Railway Company and the Illinois Central Railroad Company, et al., ("Respondents") appeared as respondents to the petition, as did several other railways.

The Honorable Judge June B. Tate held a hearing and took evidence at the Illinois Commerce Commission on October 2, 2003. At the hearing, the Petitioner presented one witness and Respondents offered the testimony of six witnesses. At no time did any member of the Staff of the Illinois Commerce Commission ("Staff") testify at the hearing. Indeed, the Staff never took a position as to the propriety of adopting the Petitioner's proposed rule, nor did the Staff even attend the hearing except by telephone. *See* Transcript of Hearing Before the Illinois Commerce Commission, Oct. 2, 2003 p. 18 (herein "Hearing Tr.").

After the hearing, the Petitioner filed a brief on October 20, 2003, addressing the evidence presented at trial. Respondents then filed a post-hearing brief of their own, on November 3, 2003.

On January 7, 2004, Judge Tate issued a Proposed Order. The Proposed Order rejected the petition. In the Proposed Order, Judge Tate concluded that the evidence presented at the hearing showed that the proposed rule would not improve worker safety and would even create additional hazards for railway workers.

The Staff, on January 16, 2004 – despite choosing to not to testify or offer a position during the hearing – filed a Brief on Exceptions to Judge Tate's Proposed Order.

ARGUMENT

I. THE STAFF'S BRIEF IS PROHIBITED BY THE ILLINOIS ADMINISTRATIVE CODE.

A. The Staff is not authorized to file its Brief.

The Illinois Administrative Code dictates when parties may bring briefs arguing against a proposed order. Section 200.830 states that "any party or Staff witness may file exceptions to the proposed order." Ill. Admin. Code § 200.830(a). Section 200.40 defines "Staff witness" as "a member of the Commission staff, excluding counsel, who testifies or enters an appearance in a particular proceeding before the Commission." *Id.* § 200.40. The Staff's "Brief on Exceptions" was filed by Michael E. Stead. Mr. Stead never testified in these proceedings and never provided any evidence to the Administrative Law Judge during the hearing. Indeed, Mr. Stead has not been heard from at all, except to ask a handful of questions by phone at the October 2, 2003 hearing. Neither Mr. Stead nor any other Staff witness offered evidence or presented argument in favor (or against) the rule proposed by the Petitioner. Having not participated as a witness, the Staff is prohibited by the Illinois Administrative Code from filing a brief that purports to analyze the evidence and conclude that Judge Tate's analysis was wrong. The Staff's Brief should therefore be stricken.

B. The Staff's Brief fails to comply with the Administrative Code.

Not only is the Staff not authorized to file a "Brief on Exceptions," the Brief that was filed fails to comply with the Administrative Code. The Administrative Code recognizes the deference that must be given to the Administrative Law Judge and her chance to observe the witnesses and their demeanor, assess their credibility, and review

the evidence. The Code takes great effort to set forth the precise standards for Exceptions. The Code states that

> Exceptions and replies thereto with respect to statements, findings of fact or rulings of law *must* be specific and *must* be stated and numbered separately in the brief. When exception is taken or reply thereto is made as to a statement or finding of fact, a suggested replacement statement or finding *must* be incorporated.

Ill. Admin. Code § 200.830(b) (emphasis added).

The Staff's "Brief" fails to comply with these requirements in at least two ways. First, the Staff's Brief does not specify or number Judge Tate's findings of fact and rulings of law to which the Staff takes exception. *See* Staff Brief on Exceptions pp. 1-5. Instead, the Staff's Brief generically "presents its recommendation that the United Transportation Union's petition for rulemaking . . . be granted." *Id.* p. 1. The Brief then goes on to recite the Staff's view of the evidence presented at the October 2, 2003 hearing. *Id.* pp. 2-4. Although the Brief makes some isolated comments on some of the evidence presented, it never offers specific exceptions to the many findings of fact included in Judge Tate's Proposed Order, as is required by law for any properly filed Exceptions.

The Brief also completely fails to present "a suggested replacement statement or finding," even though such suggestions "must be incorporated" in the Brief. Ill. Admin. Code § 200.830(b). In its "Conclusion," the Brief simply states that "Staff believes that employee safety must be of primary concern." Staff Brief on Exceptions p. 4. The Brief then urges in its "wherefore" paragraph that the UTU's petition be granted. This kind of conclusory argument is not permitted even in a properly filed Brief on Exceptions, as is made clear by the Administrative Code's requirement that parties taking exception point out exactly what they think is wrong with a proposed order and exactly how to fix it. The

Staff has done neither in this instance, and its Brief should therefore be stricken for that reason as well.

II. THE STAFF'S BRIEF ON EXCEPTIONS MISCHARACTERIZES THE EVIDENCE IN THIS PROCEEDING.

Even if the Staff's Brief were allowed to stand and it was concluded that the Commission had authority to consider it, the Staff's Brief badly miscolors the evidence in the record. The Staff's Brief errs in describing the Petitioner's arguments and evidence, and fails to understand the evidence presented by Respondents, all the while not offering any evidence of the Staff's own (which it could not) but instead merely speculating about what was (and was not) presented at the hearing.

A. The Staff's Brief inaccurately describes Petitioner's case.

The Staff's Brief inaccurately recounts the arguments and evidence presented by Petitioner. The Staff's Brief contains several misinterpretations of the arguments and evidence in this case.

First, the Staff states that the "Petitioner referred to 625 ILCS 5/18c-7401" as the basis for the proposed rule. Staff Brief on Exceptions p. 1. Petitioner expressly conceded that 625 ILCS 5/18c-7401 provides no authority for the adoption of the proposed rule. *See* Petitioner's Response Brief at 16-17; s*ee also* Joint Response to the Petition at 7-10.

Second, the Staff claims that "Petitioner indicated that several other Public Utility Commissions have adopted comprehensive walkway standards for railway carriers." Brief on Exceptions p. 2. Petitioner offered testimony that some sort of walkway regulation had been adopted in five states. Hearing Tr. pp. 44-46. This fact, however, in no way undercuts Judge Tate's Proposed Order. As established at the October 2, 2003 hearing,

the American Railway Engineering and Maintenance-of-Way Association ("AREMA") promulgates recommendations for railroad construction and maintenance. AREMA recognizes that its guidelines are not the only acceptable engineering and maintenance methods and that railroads may choose to use other standards where needed. Hearing Tr. pp. 182-184; Norfolk Southern Ex. 4. That is, AREMA specifically acknowledges that local conditions, such as geography, can alter what are appropriate engineering and maintenance practices. As AREMA recognizes, just because a practice or even regulation may be sensible in one locale does not mean it is worthwhile in another. All of the states referred to by Petitioner are in the western United States, in the Ninth Circuit. Indeed, Petitioner presented no evidence that the conditions present in Illinois are in any way similar to the conditions in the five states Petitioner identified as having passed walkway rules. The fact that other states may have adopted some sort of walkway rule is irrelevant to the question of whether a walkway rule is needed or is proper in Illinois.

Third, the Staff asserts that the "Petition included language that is similar to language previously agreed to by the railroad industry." Staff Brief on Exceptions p. 2. The record here establishes that three railroads have offered a limited agreement to some proposed language. Those three railroads are *not* "the railroad industry." These Respondents have never agreed to any walkway rule, and for good reason, as established by the record. Judge Tate recognized the lack of need for any such rule and the problems that would be created by it in the Proposed Order of January 7, 2004. Nothing in the Staff's Brief is sufficient to justify the issuance of an Order mandating compliance with a walkway rule.

Fourth, the Staff's Brief suggests that Remote Control Locomotive ("RCL") operations are increasing, and this "increase in RCL operations will likely require additional walking for railroad workers" and that this increase will cause safety problems. Staff Brief on Exceptions p. 2. This suggestion completely misstates the evidence presented at the hearing. The only witness with first-hand knowledge of the effects of RCL devices, Canadian National's Mike Oakley, testified that RCL devices do not result in additional walking for railroad employees (Hearing Tr. pp. 101-02) and do not create any hazards. *Id.* pp. 85-86. Judge Tate cited Mr. Oakley's testimony and apparently found him to be more credible than the one witness called by Petitioner. Proposed Order pp. 3, 7. The Petitioner was completely unable to present *any evidence* of any safety problems caused by remote control. In fact, the actual safety data makes clear that there are no such problems. In Canada, where remote control locomotive devices have been in use for some time, there has been a steady *decline* in slip and fall injuries over the past five years. Hearing Tr. pp. 141-142; Illinois Central Ex. 3. The Petitioner failed to present any actual evidence of safety problems from RCL operations, nor did it explain how its proposed regulation would solve these problems.

Fifth, the Staff's Brief asserts that there are "historically high railroad worker accident and injury rates." Staff Brief on Exceptions p. 2. Judge Tate's Proposed Order tackles this fallacy head on, at least with respect to the idea that Illinois is a particularly dangerous state in which to work on a railway. Judge Tate found that "[w]hen the data is normalized, Illinois is seventeen [in injury rates], not two." Proposed Order p. 7. The Staff's Brief makes no attempt, nor could it, to explain how this finding might be wrong.

Sixth, the Staff's Brief adopts wholesale the ideas put forth by Petitioner. The Petitioner presented only one witness at the hearing, the union's legislative director, Joseph Szabo. In contrast to Petitioner's testimony, the Respondents called six witnesses with years of experience in railroad track engineering and maintenance and railroad safety, including Joseph K. Lynch, chairman of the AREMA subcommittee on roadway and ballast, and who was involved in the drafting of AREMA's ballast specifications. Hearing Tr. pp. 179-81. All six of the Respondents' witnesses testified that based upon their knowledge and experience, the Petitioner's proposed walkway rule was unneeded and, indeed, harmful. The Staff's Brief offers no reason, and could offer no compelling reason, to adopt the views of the one witness called by Petitioner, who never had any track engineering experience and does not really even actively work on rail walkways.

Finally, the Staff admits that the "[i]nformation provided by Petitioner should be revised to accommodate conditions relevant to railroad operations and conditions in Illinois." Staff Brief on Exceptions p. 4. Yet the Staff's Brief goes on to recommend the wholesale adoption of the proposed rule. *Id.* p. 5. This inconsistency is yet another reason the Staff's Brief should not cause the Proposed Order to be changed.

B. The Staff's Brief inaccurately describes Respondents' case.

Just as the Staff's Brief misreads the Petitioner's case, the Staff's Brief fails to acknowledge the overwhelming weight of the evidence presented by Respondents. The Staff's Brief incorrectly describes the Respondents' case in several ways.

First, the Staff acknowledges that Respondents presented testimony that smaller ballast (as would be required under the Petitioner's proposed rule) would lead to drainage problems, which would in turn lead to serious safety problems like derailments. Staff

Brief on Exceptions p. 3. The Staff goes on, however, to speculate that the "construction techniques used by railroads when building highway-grade crossings demonstrates" that smaller ballast can be used without damaging track integrity. *Id.* Despite this speculation, neither the Staff nor the Petitioner presented any *evidence* of how the Respondents' concerns about smaller ballast can be safely addressed. Further, Respondents presented a witness who testified that the AREMA standards (including highway-grade crossing standards) are merely guidelines, not the rigid rule urged by Petitioner. Hearing Tr. pp. 182-84. Because the highway-grade crossing standards are flexible, they pose far less danger to track integrity than the proposed rule.

Second, the Staff attempts to undercut the persuasive evidence offered by Respondents that the proposed rule would not improve safety. The Staff's Brief "does not dispute the validity of the company records, but wonders if the information is relevent for all states in which the company operates." Staff Brief on Exceptions p. 3. The record contains ample testimony regarding the low level of walkway-related injuries in Illinois. Norfolk Southern's Don Browning testified that there were less than four walkway-related injuries at Norfolk Southern's Chicago and Decatur operations in each year from 2000-2003. Hearing Tr. pp. 159-60 & Norfolk Southern Ex. 2; *see also* Hearing Tr. pp. 136-38, 145-46 (Canadian National recorded 19 total walkway-related injuries in Illinois from 2000-03). It is well and good for the staff to "wonder," whatever that is supposed to mean, but neither the Staff nor the Petitioner introduced any evidence questioning the injury or safety data presented by Respondents, or establishing how that data may be relevant in some places but not in others. The unopposed data presented by Respondents makes clear that there is no need in Illinois for any walkway rule.

As the Respondents' engineering witnesses testified, larger ballast drains better than smaller ballast. *Id.* pp. 112; 116; 188-189; 203, 224-225. The larger ballast is more durable, breaks down more slowly, and requires less cleaning. *Id.* p. 113. The Respondents' witnesses also testified that a 1:8 slope, as would be required by the proposed rule, is not the most efficient means to drain the track support structure. *Id.* pp. 196-197. A steeper slope allows water to drain more effeciently. *Id.* Failure to ensure adequate track drainage can create a number of problems for railroads. Poor drainage often leads to the very muddy conditions about which the Petitioner complains. *Id.* pp. 56, 199. Standing water near the track is an especially serious safety problem in cold weather when ice can form. *Id.* pp. 56-57. Poor drainage can also result in the loss of track stability, creating a risk of derailment. *Id.* pp. 192, 225-226. These concerns are valid in all states, including Illinois. The Staff is free to "wonder" all it wants, but the testimony offered by Respondents was thorough and the best available. If the Staff or Petitioner had better evidence, they were free to present it. The Staff's "wonder" is no reason not to adopt the Order proposed by Judge Tate.

Third, the Staff attempts to question the Respondents' evidence that RCL operations improve safety. The Staff's Brief states that the "*only* concern Staff has about this [testimony] is that too little is known about RCL in Illinois to verify the [Respondents'] position." Staff Brief on Exceptions p. 4 (emphasis added). Even this sole "concern" is misplaced. Respondents offered detailed testimony about the effect of RCL operations in Canada upon worker safety. In Canada, where remote control locomotive devices have been in use for some time, there has been a steady *decline* in slip and fall injuries over the past five years. Hearing Tr. pp. 141-142. RCL operations, as

every party acknowledged at the hearing, are in their infancy in Illinois. The data presented by Respondents at the hearing was the best available data for determining the effect of RCL operations on worker safety. Judge Tate saw an actual RCL device, and saw a rail worker put it on and wear it (Hearing Tr. pp. 79-82) and reached a wholly supported conclusion about whether such devices raise any legitimate safety issue at all. If the Staff or Petitioner had better evidence, they could have offered it. The Staff's "concern" offers no reason not to adopt the Proposed Order.

C. Judge Tate's findings of fact, made after presiding over the hearing, should not be disturbed because of the Staff's post-hoc speculation.

Judge Tate's Proposed Order was based on her detailed findings of fact. The Proposed Order thoroughly recounts the testimony presented at the hearing. Proposed Order pp. 3-7. Judge Tate then analyzed this testimony and made factual findings. For example, Judge Tate rejected the Petitioner's assertions that Illinois railway safety is the second-worst in the country. *Id.* p. 7. Also, Judge Tate – after noting that the "most experienced expert witness on ballast, Mr. Lynch, does not see a necessity for walkways" – proposed that "the Commission is of the opinion that the construction of walkways is *not* in the best interest of railroad safety and that the perilous safety situation of the railroad workers has been overstated." *Id.* p. 8 (emphasis added).

These findings obviously depended upon an assessment of the evidence and the credibility of the witnesses. Judge Tate made her findings after observing the demeanor of the witnesses and considering their testimony, including the physical testimony such as the demonstration of wearing an RCL device. The Staff, who did not even attend the hearing

in person, cannot overcome Judge Tate's thorough evaluations by speculating about whether there might be other evidence that was never presented.

III. THE STAFF'S BRIEF IGNORES THE FACT THAT THE COMMISSION DOES NOT HAVE THE POWER TO ADOPT THE REGULATION PROPOSED BY THE PETITIONER.

The Staff has never chosen to address the fact that adoption of the Petitioner's proposed railroad walkway rule is beyond the Commission's power. Not only would the rule be preempted by Federal law, it would also exceed the authority delegated to the Commission by the Illinois General Assembly, as fully set forth in Respondents' November 3, 2003 post-hearing brief and the Respondents' September 29, 2003 joint response to the petition. *See* Post-Hearing Brief pp. 1-11, Joint Response pp. 2-11.

A. The proposed rule would be preempted by Federal law, which already regulates the track support structure.

The Federal Railroad Safety Act of 1970 (the "FRSA") provides that "[l]aws, regulations and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106 (2003). State laws, regulations, or orders related to railroad safety are invalid to the extent the Secretary of Transportation (the "Secretary") "prescribes a regulation or issues an order covering the subject matter of the State requirement." The FRSA leaves a role for state regulation of railroad safety where "necessary to eliminate or reduce an essentially local safety hazard," but only if the state law "is not incompatible with a law, regulation, or order of the United States Government; and does not unreasonably burden interstate commerce." 49 U.S.C. § 20106 (2003).

By any standard, the Secretary has promulgated regulations covering the subject matter of the proposed rule. 49 C.F.R. § 213.03 (2003) provides:

> Unless it is otherwise structurally supported, all track shall be supported by material which will –
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
> (c) Provide adequate drainage for the track; and
> (d) Maintain proper track crosslevel, surface and alinement [sic].

Clearly, the Federal Railroad Administration ("FRA") regulates the structure supporting railroad track. As demonstrated time and again at the hearing, the "subject matter" of the Petitioner's proposed rule includes the track support because any regulation of the walkway is necessarily regulation of the track support structure. Joseph Lynch, a witness with 50 years of experience in the railroad industry, explained:

> Q. Can you tell us, Mr. Lynch, whether walkways, which is what these rules purport to address, are part of the structure of a railroad track?
>
> A. Yes, I can. Any time that you put any type of structure or add anything to the railroad road bed, it becomes a part of that structure. The railroad road bed is comprised of two specific sections; the superstructure which covers the ties, the rail, and the substructure, which is comprised of the track ballast, the sub ballast and the sub grade.
>
> Q. All right. Can you tell us, Mr. Lynch whether the ballast itself that is used on a walkway is part of the track structure?
>
> A. It is a very definite part of the track structure.

Hearing Tr. pp. 185-186. He described in some detail how a walkway designed to the specifications of the proposed rules might interfere with drainage of the track support structure and lead to unsafe conditions, even derailments. Hearing Tr. 190-193; *see also* Norfolk Southern Ex. 5.

The evidence that walkways are part of the track structure was totally uncontested. In fact, the walkways depicted on the drawings attached to the original Petition clearly show that they are part of the ballast support for the track. Petitioner's Exhibit 16. While the Petitioner's sole witness, who has been primarily a passenger conductor and union legislative director (Hearing Tr. pp. 25-27, 52-53), suggested that the proposed rule would not run afoul of the Federal ballast regulations because it did not necessarily require ballast to be used as a walkway surface (Hearing Tr. pp. 68-69), the witnesses who maintain track structures as part of their job duties agreed that as a practical matter railroad walkways consist of the material that supports the track, i.e., stone ballast.

B. The Illinois General Assembly has not delegated to the Commission the power to adopt the proposed rules.

"The [Illinois Commerce] Commission, because it is a creature of the legislature, derives its power and authority *solely* from the statute creating it, and its acts or orders which are beyond the purview of the statute are void." *City of Chicago v. Illinois Commerce Comm'n*, 79 Ill.2d 213, 217-18, 402 N.E.2d 595, 597-98 (1980) (citing *People ex rel. Illinois Highway Transp. Auth. Co. v. Biggs.*, 402 Ill. 401, 84 N.E.2d 372 (1949)) (emphasis added). In order for the Commission to adopt the Proposed Rules or any other valid walkway regulations, there must be authority conferred upon it by the Illinois General Assembly.

The Petitioner relies exclusively on 625 ILCS 5/18c-1202 (2003), which gives the Commission the power to "[a]dopt appropriate regulations setting forth the standards and procedures by which it will administer and enforce [Chapter 625], with such regulations

being uniform for all modes of transportation or different for the different modes as will, in the opinion of the Commission, best effectuate the purposes of [Chapter 625]." While that section gives the Commission power to adopt regulations necessary to implement whatever authority the General Assembly has delegated to it under Chapter 625, *the substantive source of the power to regulate a particular subject matter must be found somewhere in Chapter 625.* Without such a limitation, which is clearly expressed on the face of Section 5/18c-1202, the General Assembly's delegation of authority to the Commission would be nearly limitless. This could not have been the General Assembly's intent. Otherwise, the substantive grant of regulatory power to the Commission over grade crossings and other railroad facilities found in Section 5/18c-7401, along with a significant portion of the remainder of Illinois' Commercial Transportation Law, would have been pointless. If the General Assembly had wanted to grant such open-ended authority to the Commission, it would have written Section 5/18c-1202 without limiting the Commission's rulemaking power to those matters set forth by the General Assembly in Chapter 625.

CONCLUSION

For all of the reasons described above and in Respondents' September 29, 2003 joint response to the petition and November 3, 2003 post-hearing brief – both incorporated by reference herein – the Respondents respectfully request that the Staff's "Brief on Exceptions" be stricken, or in the alternative, that any of its purported "Exceptions" be rejected and that the Commission adopt Administrative Law Judge June B. Tate's Proposed Order of January 7, 2004 and deny the United Transportation Union – Illinois State Legislative Board petition filed on February 18, 2003.

Dated: January 27, 2004

Respectfully submitted,

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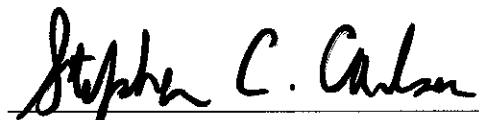
CERTIFICATE OF SERVICE

I, Stephen C. Carlson, an attorney, certify that I caused a copy of the attached JOINT MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., TO STRIKE STAFF "BRIEF ON EXCEPTIONS" and attached MEMORANDUM IN SUPPORT OF THE JOINT MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., TO STRIKE STAFF "BRIEF ON EXCEPTIONS" AND, IN THE ALTERNATIVE, BRIEF IN REPLY, to be served on each of the parties listed on the attached service list by messenger or United States mail this 27th day of January, 2004.

By: 
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